United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 1, 2008

TO : Rik Lineback, Regional Director

Region 25

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: United States Postal Service

Case 25-CA-30307

506-4033-3000 524-4029-9800 530-6025

This Weingarten¹ case was submitted for advice on: (1) whether the Postal Service unlawfully denied two employees' requests to be assisted by a Union representative during interviews regarding the suspected misconduct of another employee, where they were informed that false statements during the interview could result in discipline including discharge; and (2) whether, as part of the same investigation, the Postal Service violated the Weingarten rights of 20 additional employees who were interviewed, but who did not request Union representation after they were informed from the outset that they were not entitled to Weingarten representation. We conclude that the Region should dismiss the charge, absent withdrawal, because none of the employees who were interviewed reasonably feared disciplinary action for their own conduct.

FACTS

In February 2007, the Postal Service conducted an investigation into suspected misconduct by the Union steward at the Oaklandon Post Office Branch in Indianapolis.² The Oaklandon customer service manager called at least 22 employees into her office for one-on-one interviews using identical interview forms for each employee. At the outset of each interview, the customer service manager read aloud, or permitted the interviewee to read, the following statement located at the top of the interview form:

This...interview is in regards to information received regarding alleged misconduct of [the Union steward]. You are required to participate in this investigation

¹ NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

² All dates are in 2007 unless otherwise indicated.

in accordance with the Section 665.3 of the Employee and Labor Relations Manual. You are required to answer truthfully. Although it is not anticipated, you are being informed that providing false information in an official investigation can result in discipline up to and including removal form the Postal Service. Since disciplinary action will not result from this interview as it is a fact finding interview, you do not have a contractual right to Weingarten representation.

At each interview, the customer service manager read the interviewee 21 questions and wrote down his or her answers. The first three questions asked whether the employees understood that they were required to cooperate and be truthful, and that providing false information could result in discipline up to and including discharge.

Two employees requested the assistance of a Union steward during their interviews, and the Postal Service denied both requests. One of these employees requested Union assistance after reading the statement at the top of the interview form. The customer service manager responded that he did not have the right to a representative at the interview unless he intended to lie, because the investigatory interview was not about his conduct. The employee renewed his request for representation, which was again denied. The employee ultimately consented to the interview without Union assistance because the statement at the top of the interview form said he was required to participate.

In addition to those two employees, 20 other employees were interviewed as part of the investigation, but neither requested nor received Union assistance. No employees have been disciplined based on their interviews.

ACTION

The Region should dismiss the charge, absent withdrawal. An employee is entitled to <u>Weingarten</u> representation only during an investigatory interview where the employee reasonably fears discipline for his or her own conduct. The Postal Service made clear to each employee being interviewed that the investigation concerned the conduct of another employee, and the employees who were interviewed did not reasonably fear disciplinary action for their own conduct during their interviews.³

³ In light of this conclusion, the Joint Settlement Stipulation between the Board and the Postal Service regarding Weingarten violations alleged to have been

In <u>Weingarten</u>, the Supreme Court held that employees in a unionized workplace may request the presence of a union representative at an investigatory interview that the employee reasonably believes may result in disciplinary action.⁴ Neither the employees' subjective beliefs nor the employer's actual intent regarding the imposition of discipline are material.⁵ After a valid request for union representation at an investigatory interview, the employer may grant the request, give the employee the option to continue with no witness, or end the interview.⁶

The Board has indicated that <u>Weingarten</u> rights apply only when employees reasonably fear discipline for their own misconduct. We are aware of no cases finding that an investigatory interview solely concerning another employee's alleged misconduct gives Weingarten rights to

committed by the Postal Service is not implicated. See generally, "Pilot Program for United States Postal Service Weingarten Cases," Memorandum OM 08-43(CH) (Revised), dated March 31, 2008.

Weingarten, 420 U.S. at 256. Weingarten rights only apply to fact-finding interviews, as opposed to run-of-the-mill shop floor conversations, id. at 257-258, citing Quality Mfg. Co., 195 NLRB 197, 199 (1972), or announcements of pre-determined discipline, Baton Rouge Water Works Co., 246 NLRB 995, 997 (1979).

⁵ Weingarten, 420 U.S. at 257 n.5 (specifically rejecting any rule that required probing an employee's subjective motivations); Consolidated Edison Co. of New York, 323 NLRB 910, 910 (1997) ("[I]t is no answer to this allegation of a Weingarten violation that the Respondent's supervisors were only engaged in fact finding, or that they had no intention of imposing discipline...at the time of the interview. Neither of those conditions are inconsistent with [the employee's] reasonable belief that discipline could result").

⁶ Weingarten, 420 U.S. at 256-257, 260-261.

⁷ See <u>United States Postal Service</u>, 252 NLRB 61, 61 (1980) (fitness for duty examinations not "calculated to form the basis for taking disciplinary or other job-affecting actions...because of past misconduct"); <u>Northwest Engineering Co.</u>, 265 NLRB 190, 190-191 (1982) (<u>Weingarten relates to "past conduct for which employees fear the imposition of current sanctions").</u>

the employee being interviewed.⁸ Here, the Postal Service made clear that the investigation concerned alleged misconduct by the Union steward, not by any of the employees being interviewed.

Nor did the employees reasonably fear discipline for their own conduct during the interviews. While the Postal Service informed each employee that providing "false information" during the interview could result in discipline, including discharge, the employer-employee relationship certainly contains an implied expectation that employees will not provide false statements during an employer's investigation of misconduct. The Postal Service simply rendered that implicit understanding explicit. Indeed, if the Postal Service's warning triggered Weingarten rights in this case, then every investigatory interview involving questioning of employees whose conduct is not at issue automatically would trigger Weingarten rights.

We recognize that Postal Service regulations subjecting employees to discipline for failing to report misconduct by other Postal Service employees could, in theory, create a reasonable fear of discipline even for employees who provided truthful responses during their interviews. 10 For example, even if an interviewee provided accurate information about the steward's misconduct, the employee could be subject to discipline if he or she had failed to report it earlier. 11 We find no reasonable

⁸ Cf. Consolidated Casinos Corp., 266 NLRB 988, 1009 (1983) (Weingarten rights attach to pre-polygraph interviews where management agents asked employees if they had stolen from the employer, engaged in other improper conduct, or knew of others who had engaged in misconduct) (pro forma adoption of violation).

 $^{^9}$ Cf. <u>id.</u> at 1010 (because an employee's "actions and statements" during post-polygraph interview were "important factors in determining his or her fate," <u>Weingarten</u> rights attached to those interviews).

¹⁰ See USPS Employee and Labor Relations Manual Section 665.14 and 665.6.

¹¹ Cf. New Jersey Bell Telephone Co., 308 NLRB 277, 286 (1992) (employees reasonably feared discipline during investigatory interviews because "if they declined to make incriminating statements, they would be disciplined for withholding information, but if they did give incriminating statements, they would be disciplined for participating in or failing to report the incident in question") (Member

expectation of discipline here, however, because the Postal Service made clear that "disciplinary action will not result" from the interview. 12

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

Devaney, concurring in part and dissenting in part); $\underline{\text{Good}}$ $\underline{\text{Hope Refineries}}$, 245 NLRB 380, 383-384 (1979), enfd. $\overline{\text{620}}$ $\overline{\text{F.2d}}$ 57 (5th Cir. 1980), cert. denied 449 U.S. 1012 (employee had reasonable fear of discipline at meeting where manager sought explanation for three-day work absence, notwithstanding manager's statement that employee was "not here for a reprimand," where contract provided that three consecutive unexcused absences may result in loss of seniority and employees had received management letter announcing that unapproved absences could result in discipline including suspension or discharge).

¹² See Amoco Chemicals Corp., 237 NLRB 394, 396-397 (1978) (any reasonable apprehension of discipline during investigatory interview was effectively dissipated by supervisor's express assurances to employees that no disciplinary action would be taken against them).